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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 541.

THE UNITED STATES, *Plaintiff in Error*,

vs.

PRESS PUBLISHING COMPANY.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR ON THE QUESTION OF THIS COURT'S POWER TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT.

DE LANCEY NICOLL,
JOHN D. LINDSAY,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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THE UNITED STATES, Plaintiff in Error,

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SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

FIRST.—The Circuit Court properly entertained and passed upon the motion to quash on the trial.

1. When an indictment cannot be proceeded with "advantageously to public justice," or without inflicting an unnecessary wrong upon the defendant, the trial judge may, in his discretion, quash it, or "in other words, cause it to abate."

1 Bishop's New Cr. Proc., Sec. 759.

2. The motion to quash

> "is an appeal to the judicial discretion, wherein what seems to the judge just in the particular instance is regulated by rule."
>
> Bishop's New Crim. Proc., Vol. I, Sec. 761.

3. Although "the favored time" for the motion is before plea, still it may properly he heard

> "even during a trial, and even after the evidence is in; and, in short, it is in order, without any withdrawal of plea, at any time down to the rendition of the verdict."
>
> *Id.*, Sec. 762.

4. The trial judge may, in proper circumstances aid his direction

> "by looking into what is brought to his attention outside the indictment and even outside the record of the cause for which purpose the prosecuting attorney may admit a fact, or it may be shown by affidavit, and in either case it will, if of the due relevancy, be considered in connection with the indictment as foundation for the motion to quash."
>
> *Id.*, Sec. 763.

5. *Want of jurisdiction* is a "favored ground" for quashing the indictment.

Id., Sec. 772.

In Reg *v.* Heane, 9 Cox, Cr. C., 433, Cockburn, *C. J.*, said:

> "As regards the objection that the motion to quash cannot be made after plea pleaded, I think if it is made to appear clearly that there was no jurisdiction we have power to quash the indictment at any stage, and even for matter not apparent on the face of the indictment, brought to our notice by extraneous evidence upon affidavit."

See also

Justice *v.* State, 17 Ind., 56.
Bell *v.* Com., 8 Grat., 600.

SECOND.—This is not a moot case, since, should the judgment of the court below be reversed, the defendant may be placed on trial again.

A defendant is not in jeopardy until he has been legally convicted or acquitted by the verdict of a jury, unless the trial is terminated short of a ver-

dict by the fault of the prosecutor. Legal jeopardy does not arise if the jury are discharged before verdict, with the consent of the accused, express or implied. Such consent is implied when the discharge is the necessary result of a decision rendered upon his application, and for his benefit.

Cooly, Const. Lim. (7th Ed.), 468–70.
Story, Const., Sec. 1787.
Ex parte Lange, 18 Wall., 201.
United States *v.* Haskell, 4 Wash., 410.
United States *v.* Keen, 1 McLean, 429.
People *v.* Casborus, 13 Johnson, 351.
State *v.* Garvey, 42 Conn., 232.
Joy *v.* State, 14 Ind., 139.
Gerard *v.* People, 3 Scam. (Ill.), 362.
Peiffer *v.* Com, 15 Pa. St., 468.
State *v.* Davis, 80 N. C., 384.
State *v.* Spier, 1 Dev., 491.

See also

United States *v.* Ball, 163 U. S., 662, 672.
Jones *v.* United States, 31 Fed. Rep., 725.
Coleman *v.* Tennessee, 97 U. S., 509, 520–1.

Respectfully submitted,

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